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In The
Supreme Court of The United States
October Term 1998

VINCENT GIGANTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the Court of Appeals for the Second Circuit misconstrued the Sixth Amendment's Confrontation Clause, and this Court's decisions in *Coy v. Iowa,* 487 U.S. 1012 (1988), and *Maryland v. Craig,* 490 U.S. 836 (1990), as well of the Federal Rules of Criminal Procedure, when it ruled that it was proper to apply its own newly created "interest of justice" test, rather than the two-prong test announced by this Court in *Maryland v. Craig,* for determining that a crucial trial witness -- an Organized Crime murderer in the federal witness protection program who was suffering from terminal cancer -- should be allowed to testify by way of two-way, closed-circuit television, in derogation of petitioner's constitutional right of face-to-face confrontation?

2. Whether the Court of Appeals for the Second Circuit violated petitioner's constitutional right of confrontation, and placed itself in conflict with other federal courts of appeals and a number of state appellate courts, when it expressly held that because the witness's testimony had been televised by two-way, closed-circuit television, rather than by one-way, closed-circuit television, it was appropriate to disregard *Maryland v. Craig's* two-prong test governing the use of televised testimony, i.e., actual necessity and compelling state interest, in favor of an amorphous "interests of justice" standard?

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The decision of the United States District Court for the Eastern District of New York (Weinstein, J.) pertaining to the use of televised testimony, which was rendered during the middle of trial on July 21, 1997, is reported in *United States v. Gigante,* 971 F.Supp. 755 (E.D.N.Y. 1997). That opinion is appended as *Appendix B.*

The decision of the United States Court of Appeals for the Second Circuit, affirming petitioner's judgment of conviction, was rendered on January 22, 1999. That decision is reported in *United States v. Gigante,* 166 F.3d 75 (2d Cir. 1999). That opinion is appended as *Appendix A.*

Petitioner moved for rehearing in timely fashion, and that motion was denied by the court of appeals on March 11, 1999. A copy of the court of appeals' order is appended hereto as *Appendix A, p. 22-23.*

The Basis for This Court's Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 22, 1999. Timely motion for rehearing was denied on March 11, 1999. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

The Constitutional & Statutory Provisions Involved in This Case

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules of Criminal Procedure, Rule 15, provides:

> Rule 15. Depositions
>
> (a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken

by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. . . .

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present

at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

* * * *

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. .

. .

Federal Rules of Criminal Procedure, Rule 26, provides:

Rule 26. Taking of Testimony

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

Statement of the Case

The following Statement of the Case is drawn primarily from the opinion of the court of appeals (*Appendix A*):

"This case arises from the government's continuing efforts to thwart the criminal activity of La Cosa Nostra, also known as the Mafia. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese and Genovese families, each spearheaded by a boss. [Citation omitted]. The government asserted that Vincent Gigante was the boss of the Genovese family and supervised its criminal activity.

"Gigante was charged with two major categories of crimes: murder and labor racketeering. The government alleged that Gigante was the ultimate authority behind the murders of many fellow members of the Mafia, which were generally intended to enforce the rules of the organization or to prevent cooperation with the authorities. The government also charged Gigante with conspiring to use extortion and kickbacks to effect the criminal infiltration of the window replacement industry in and around New York City. He followed a long line of other organized crime figures whom the government had already convicted for their participation in this "Windows" scheme. [Citation omitted].

"The government presented its case against Gigante in large part through the testimony of six former members

of the Mafia who had become cooperating witnesses: Alphonso D'Arco, once the acting boss of the Lucchese family; Salvatore Gravano, the former Gambino family underboss; Peter Chiodo, who was a Lucchese captain; Phillip Leonetti and Gino Milano, past members of La Cosa Nostra in Philadelphia; and Peter Savino, a former associate of the Genovese family. The government also introduced a wealth of tapes recorded over many years of surveillance of Gigante and other Mafia figures, and supported this evidence with the testimony of law enforcement officers.

"The cooperating witnesses testified at length about the structure and rules of La Cosa Nostra, described Gigante's place in the Mafia hierarchy, and detailed his efforts to hide his complicity through continuous public demonstrations of mental instability. The tapes[1] and witnesses revealed Gigante's complicity in planning and approving murders within the Mafia and in assisting in the direction of the Windows extortion scheme.

"The jury acquitted Gigante or failed to reach a verdict on all charges surrounding the murders of Jerry Pappa, Anthony Capongiro, Fred Salerno, John "Keys"

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[1]It was undisputed at petitioner's trial that with all of the government's wiretap evidence that spanned many years of covert electronic surveillance, petitioner's voice was never intercepted in a single criminal conversation.

Simone, Frank Sindone, Frank "Chickie" Narducci, Rocco "Rocky" Marinucci, and Enrico "Eddie" Carini. The jury found Gigante guilty of the more recent conspiracies to murder Peter Savino and John Gotti, although the court later dismissed the charge of conspiracy to murder Gotti as time-barred. (Citation omitted). Gigante was also convicted on all the extortion and labor payoff counts related to the Windows scheme. (Citation omitted). Gigante was sentenced to twelve years in prison, five years of supervised release, and a fine of $1,250,000. . . . .

* * * *

"Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante, providing direct testimony of his involvement in the Windows scheme. As a cooperator with the government since 1987, Savino was a participant in the Federal Witness Protection Program. At the time of Gigante's trial in 1997, Savino was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location.

"The government made an application for an order allowing Savino to testify via closed-circuit television due to his illness and concomitant infirmity.[2] Judge Weinstein

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[2]As soon as this issue began to raise its head at trial, nine days before Savino actually testified, the defense (continued...)

held a hearing to determine whether Savino was able to travel to New York to testify at Gigante's trial. At this hearing, an emergency medicine physician employed by the Federal Witness Protection Program testified that he had examined Savino and that "it would be medically unsafe for [Savino] to travel to New York for testimony." Defense counsel cross-examined the government physician and then presented an oncologist of their own who testified that "it would not be life-threatening" for Savino to travel to New York.

"Judge Weinstein held in a published opinion that "[m]edical reports and testimony for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." . . . .

"Because of Savino's illness, Judge Weinstein

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[2](...continued)
warned the district court that to televise Savino's testimony to the jury under the circumstances then present would run afoul of defendant's Sixth Amendment right to a face-to-face confrontation with the trial witnesses who would testify against him, in violation of the principles laid down *Coy v. Iowa* and *Maryland v. Craig*. Petitioner's counsel stressed the importance of having Savino cross-examined live before the jury, because of his importance to the Government's case.

permitted him to testify via two-way, closed-circuit television, basing his decision upon his "inherent power" under Fed.R.Crim.P. 2 and 57(b) to structure a criminal trial in a just manner. [Citation omitted]. During his testimony, Savino was visible on video screens in the courtroom to the jury, defense counsel, Judge Weinstein and Gigante. Savino could see and hear defense counsel and other courtroom participants on a video screen at his remote location."

(*Appendix A,* pp.3 - 8).

On his appeal to the United States Court of Appeals for the Second Circuit, petitioner argued that the use of two-way, closed-circuit television to present Savino's testimony to the jury violated his constitutional right to confrontation. Petitioner pointed out that this Court's ruling in *Maryland v. Craig,* 490 U.S. 836 (1990), had established a two-prong test governing the use of televised testimony, i.e., a criminal defendant's Sixth Amendment right to face-to-face confrontation would yield only when there was true necessity for denying such confrontation, and only when there also existed in the particular case a concomitant, compelling state purpose or state interest that justified the use of such a special procedure as a substitute for in-person confrontation.

Petitioner argued that even if the appeals court rejected his contention that actual "necessity" was lacking for excusing Savino's presence at trial, neither the trial court

had found, nor had the government established, that there existed a compelling public policy or state interest that justified the presentation of the testimony of this adult, middle-aged murderer by way of closed-circuit television.

In ruling against petitioner, the Court of Appeals remarkably found that it was free to disregard the two-prong test established by this Court in *Maryland v. Craig* because Savino's testimony had been presented at trial through the use of two-way, closed-circuit television, instead of one-way, closed-circuit television:

> "In *Craig,* the Supreme Court indicated that confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U.S. at 850. ***Gigante seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a***

two-way system that preserved the face-to-face confrontation celebrated by Coy, it is not necessary to enforce the Craig standard in this case."

* * * *

"Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. ***However, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. Because this procedure may provide at least as great protection of confrontation rights as Rule 15*** [of the Federal Rules of Criminal Procedure, allowing for the use of depositions in criminal trials], ***we decline to adopt a stricter standard for its use than the standard articulated by Rule 15. Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."***

Appendix A, pp. 10 - 13 (emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law and constitutional criminal procedure. The trial court and the court of appeals invented new rules and turned their backs on the controlling constitutional and statutory text.

The Confrontation Issue

The Second Circuit's newly created "interest of justice" test governing the permissibility of using two-way, closed-circuit television to present the testimony of crucial government witnesses at a criminal trial, in derogation of a defendant's Sixth Amendment right of confrontation: (a) conflicts with *Coy v. Iowa,* 487 U.S. 1012 (1988) and *Maryland v. Craig*, 490 U.S. 836 (1990)*;* (b) creates a conflict between the Second Circuit and other federal courts of appeals, as well as state appellate courts; and (c) carries with it the certain and dangerous probability of a vast expansion of the use of televised testimony in other criminal cases. This Court should grant the writ and review this case in order to resolve an important and undoubtedly recurring question of constitutional criminal procedure, and to make clear that the exception to face-to-face confrontation that this Court recognized in *Maryland v. Craig* is a narrow one, which, at the very least, requires an application of the two-prong test established in *Craig* before a criminal defendant

may be denied the right of face-to-face confrontation with his accusers.

Last Term, in *Danner v. Kentucky*, __ U.S. __, 119 S.Ct. 529 (1998), two Justices dissented from the denial of certiorari in a case where a 15-year-old victim of sexual abuse had been allowed to testify at the defendant's trial via closed-circuit television. Justices Scalia and Thomas stated in dissent that the case should have been reviewed on certiorari and reversed "to make clear that the exception we have created to the text of the Sixth Amendment is a narrow one."

The court of appeals in this case permitted an adult, organized crime murderer, whom the Court of Appeals recognized to be a "crucial witness" at petitioner's trial, to testify by way of two-way, closed-circuit television without there being any showing that some compelling state interest justified the denial of petitioner's right of face-to-face confrontation, a showing that was presumably required by the language of this Court's decision in *Maryland v. Craig*, 490 U.S. at 850, 852-853, 855-856, *supra*.

The court of appeals reached the provocative conclusion that because the technique used in this case provided for two-way, instead of one-way, closed-circuit television, it was appropriate for that court to ignore completely the two-prong constitutional analysis governing televised testimony that had been prescribed by this Court in *Craig*. Instead, the court of appeals held that it was

alright to use televised testimony in this case because it was "in the interest of justice." Accordingly, the instant case provides this Court with an even stronger reason than did *Danner* to define the narrow parameters of the Confrontation Clause exception announced by this Court in *Craig*.[3]

In *Coy v. Iowa, supra,* this Court reversed the conviction of an alleged sexual abuser of children simply because he was not allowed to see the faces of his two 13-year-old accusers as they testified against him, and they could not see the defendant; the two girls were separated from the defendant by a screen which allowed the jury to see them as they testified. 487 U.S. at 1014-1015, 1020. In finding a Sixth Amendment Confrontation Clause violation, the Court wrote at length about the time-honored rule that an accused and an accuser should have to look each other in the eye, a rule that could be traced back to Early England and even Roman law. 487 U.S. at 1015-1016.

In its opinion in *Coy,* the Court paid homage to the notion that

". . . there is something deep in human

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[3]In addition, this case arose in federal court. The Federal Rules of Criminal Procedure and the Rules of Evidence governed the trial judge's power. The trial judge and the court of appeals had to ignore the text of the Rules in order to reach their result, as we discuss below.

nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." [Citation omitted] What was true of old is no less true in modern times.

* * * *

"The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." [Citation omitted]. It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent

> occasion to discuss, the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process"."

487 U.S. at 1016-1020.

Thus, *Coy* rests upon the constitutional text, read in the informing light of its history and purpose. It teaches us that purported technological or electronic equivalents do not erase the fundamental constitutional guarantee.

In its 5-4 decision two years later, in *Maryland v. Craig, supra,* this Court reconsidered the "face-to-face" aspect of confrontation. In *Craig* the Court upheld a state statute that shielded children of tender years, through the use of one-way, closed-circuit television, from having to look into the eyes of the adults who had sexually abused them. It did so only because it found a strong public policy interest in protecting child victims of sexual abuse from suffering even greater injury because of the need to confront the persons who hurt them.

Moreover, in *Craig* the Court made clear that even when it came to children, televised testimony was not the preferred approach, and should be employed only when truly necessary in the individual case.

> "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy,* our precedents confirm that a defendant's right to

confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. [Citations omitted].

497 U.S. at 850.

"The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest.

* * * *

"We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. [Citations omitted].

* * * *

"We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child

> witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. [Citation omitted].

497 U.S. at 852-853.

* * * *

> "Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

497 U.S. 855-856.

Nothing in *Craig* supports the court of appeals' conclusion that *Craig* may be disregarded if two-way, closed-circuit television is used, rather than one-way, closed-circuit television. Indeed, as petitioner pointed out below, this Court's decision in *Craig* specifically noted that, at the time, a number of states were already utilizing two-way, closed-circuit television hookups to televise the testimony of children. 497 U.S. at 854, n 4. Yet, there was not the slightest hint in *Craig* that the two-prong constitutional analysis announced therein might be otherwise in states that employed the two-way, closed-circuit

procedure.

Craig rests upon two foundations. First, there must be a societal judgment that identifies a class of cases in which necessity dictates selective and limited departures from "face-to-face" confrontation. In *Craig,* the Court pointed out that the legislative enactments of so many states designed to protect young children from unnecessary incremental trauma supported the finding that such a societal judgment had been made about child-witness cases. Second, in each individual case the trial judge must make case-specific findings that the necessity exists under the peculiar circumstances of that case.

The issue in this case is whether an unguided judicial pronouncement -- at odds with the federal rules, as we show below -- can provide the necessary societal judgment, and whether the trial judge and the court of appeals effectively substituted "convenient" for necessary.

No Textual Basis or Authority to Derogate from the Six Amendment

The trial judge based his ruling on Fed. R. Crim. P. 2 and 57(b). Rule 2 simply tells a judge how to interpret other rules. It does not authorize disregarding the plain text of those other rules. Compare *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982), in which this Court held that the analogous provisions of Fed. R. Civ. P. 2 do not permit a court to ignore mandatory provisions of

other rules.[4] Fed. R. Crim. P. 57(b) authorizes district courts to make housekeeping rules.

Thus, the district judge here was without authority to depart from the mandatory terms of Fed. R. Crim. P. 26, which requires "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Neither the district judge nor the court of appeals pretended that there was any rule that "otherwise provided." Fed. R. Crim. P. 26 thus stands in marked contrast to its civil counterpart, Fed. R. Civ. P. 43, which expressly permits "contemporaneous transmission from a different location" on a finding of "compelling circumstances."

Of course, Fed. R. Crim. P. 15 permits depositions, under "exceptional circumstances." However, to find, as the court of appeals did in this case, that the two-way, closed-circuit television procedure used here is analogous to the deposition procedure permitted by Fed. R. Crim. P. Rule 15 makes no sense. For, Rule 15(b) specifically honors a criminal defendant's Confrontation Clause rights by providing that the defendant, even if incarcerated, is entitled to be physically present at the deposition.

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[4] *Griggs* has been undone by amendment to Fed. R. Civ. P. 4, but the holding is still good law.

Other Courts Support Petitioner

Following this Court's decision in *Craig,* Congress, in recognition of the national public policy interest of protecting sexually abused children from incremental trauma due to the judicial process, enacted 18 U.S.C. § 3509, which specifically permits victimized children to testify via two-way, closed-circuit television upon a showing of actual necessity. Pub.L. 101-647, Title II § 225(a), Nov. 29, 1990, 104 Stat. 4798. Since then, a number of courts of appeals have entertained statutory and constitutional Confrontation Clause attacks in cases where child witnesses testified by way of two-way, closed circuit television. In virtually all of those cases, these courts have applied the constitutional analysis announced by this Court in *Craig. See, e.g., United States v. Moses,* 137 F.3d 894, 897-898 (6th Cir. 1998); *United States v. Weekly,* 130 F.3d 747, 752-753 (6th Cir. 1997); *United States v. Miguel,* 111 F.3d 666, 669-671 (9th Cir. 1997); *United States v. Garcia,* 7 F.3d 885, 887-888 (9th Cir. 1993); *United States v. Carrier,* 9 F.3d 867, 869-870 (10th Cir. 1993).

A number of state appellate courts have also considered the use of two-way, closed-circuit television in cases involving child witnesses, and they too have assumed that the constitutional analysis set forth in *Craig* was applicable. *See, e.g., Marx v. State of Texas,* 987 S.W.2d 577, 578-580 (Court of Criminal Appeals, En Banc, 1999); *Gonzales v. State of Texas,* 818 S.W.2d 756, 759-762, 764-

766 (Court of Criminal Appeals, En Banc, 1991); *In re Howard,* 119 Ohio App.3d 33, 37-38, 40 (Court of Appeals of Ohio, 1997); *State of Louisiana v. Wright,* 690 So.2d 850, 851-853 (Court of Appeals of Louisiana, 3d Cir., 1997); *People v. Vanidestine,* 186 Mich.App. 205, 206-208 (Court of Appeals of Michigan, 1990); *People v. Guce,* 164 A.D.2d 946, 947 (New York App. Div., 2d Dept. 1990). The reasoning of the court of appeals in the case at bar puts it at odds with the decisions of these state high courts, as well.

Interestingly, in *Harrell v. State,* 709 So.2d 1364 (Fla. 1998), the Supreme Court of Florida was called upon to decide whether adult robbery victims who resided in a foreign country would be permitted to testify at the defendant's Florida state jury trial by two-way, closed-circuit satellite transmission. The Florida Supreme Court took note of Judge Weinstein's lower court decision in the present case (709 So.2d at 1368), but ruled, nonetheless, that this Court's two-prong constitutional analysis in *Craig* would govern its own constitutional consideration. 709 So.2d 1369-1370. Applying *Craig,* the Florida Supreme Court ruled that the two-way, closed-circuit satellite transmission passed constitutional muster. (We question the constitutional correctness of the *Harrell* court's ultimate ruling that the *Craig* standard -- particularly on the issue of compelling state interest -- was satisfied in that case.)

These cases underscore a central tenet of *Craig* --

that its controversial reading of the Confrontation Clause rests upon a deference to a societal judgment, usually manifested by legislative enactment, concerning a class of cases. This much, the *Craig* majority made explicit. *See* 497 U.S. at 853-856. When Congress wants to make exceptions to face-to-face confrontation, it does so by statute. *See, e.g.,* 18 U.S.C. § 3509. While Congress has passed legislation to protect our Nation's children due to compelling public policy interests, no similar legislation has been enacted which applies to the testimony of ailing adult murderers who are being shielded by the federal witness protection program.

The contrast between this case and *Craig* could not be clearer. The district judge set out to make law by judicial pronouncement, without any basis in the rules or statutes. The court of appeals invented a justifying principle all its own.

Technology develops apace. Its time-saving benefits seems at times seductive. For example, a district court may think that sentencing defendants by video conference will save time and money, but such a departure from the federal rules requires Congressional action and then judicial review to see if it will meet constitutional standards. *See United States v. Navarro,* 169 F.3d 228 (5th Cir. 1999) (video conference sentencing violates federal rules).

Two-way, closed-circuit television is now easily technically available at any judicial proceeding. Decisions

in cases such as the present one, if allowed to stand, will undoubtedly engender more and more prosecutorial efforts to present televised testimony whenever the government considers it to be "in the interest of justice."

We respectfully submit that the use of televised testimony in this case resulted in a complete denial of defendant's constitutional right to confrontation. We believe that anyone who truly understands the unique dynamic of the court room trial process must recognize that watching someone's face on a television is not the equivalent of eyeball-to-eyeball confrontation of the sort contemplated by the writers of the Constitution.

If, as we believe, this Court's 5-4 decision in *Maryland v. Craig* was meant to be read as creating a carefully limited exception to the Confrontation Clause, then we respectfully submit that certiorari should be granted at this time to review the instant case and its dangerous conclusion, before the televised-testimony exception of *Craig,* as interpreted and corrupted by cases such as the present one, and perhaps cases like *Harrell v. State, supra,* ends up swallowing the Confrontation Clause rights of defendants in simply far too many criminal cases.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[CORRECTED OPINION]
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

(Argued October 20, 1998 Decided: January 22, 1999)

Docket No. 98-1001

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT GIGANTE, also known as "Chin,"
Defendant-Appellant.

Before: OAKES and WALKER, Circuit Judges, and KNAPP, District Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), after a jury trial, convicting defendant-appellant of a RICO violation, a RICO conspiracy, conspiracy to murder, an

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* The Honorable Whitman Knapp, of the United States District Court for the Southern District of New York, sitting by designation.

extortion conspiracy, and a labor payoff conspiracy.

Affirmed.

ANDREW WEISSMANN and DANIEL DORSKY, Assistant United States Attorneys (Zachary W. Carter, United States Attorney, and David C. James and George A. Stamboulidis, Assistant United States Attorneys, E.D.N.Y., Brooklyn, N.Y., of counsel), for Appellee.

STEVEN R. KARTAGENER, Esq., New York, N.Y. (Michael A. Marinaccio, Culleton, Marinaccio & Foglia, White Plains, N.Y., on the brief), for Defendant-Appellant.

JOHN M. WALKER, Circuit Judge:

Defendant-appellant Vincent Gigante appeals from a judgment of conviction entered December 18, 1997, after a jury trial in the United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge), convicting Gigante of racketeering in violation of the RICO statute, 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy to murder in violation of 18 U.S.C. § 1959(a)(5); an extortion conspiracy in violation of 18 U.S.C. § 1951; and a labor payoff conspiracy in violation of 18 U.S.C. § 371.

Gigante raises three challenges to his conviction. First, he contends that the district court violated his confrontation rights under the Sixth Amendment by allowing a government witness to testify via two-way closed-circuit television from a remote location. Second, he argues that the trial court improperly allowed testimony under the co-conspirator exception to the hearsay definition. Finally, Gigante argues that the district court erred in finding that he was competent to stand trial. For the reasons set forth below, we reject each of Gigante's arguments and affirm his conviction.

BACKGROUND

This case arises from the government's continuing efforts to thwart the criminal activity of La Cosa Nostra, also known as the Mafia. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese and Genovese families, each spearheaded by a boss. See United States v. Orena, 32 F.3d 704, 708 (2d Cir. 1994). The government asserted that Vincent Gigante was the boss of the Genovese family and supervised its criminal activity.

Gigante was charged with two major categories of crimes: murder and labor racketeering. The government alleged that Gigante was the ultimate authority behind the murders of many fellow members of the Mafia, which were

generally intended to enforce the rules of the organization or to prevent cooperation with the authorities. The government also charged Gigante with conspiring to use extortion and kickbacks to effect the criminal infiltration of the window replacement industry in and around New York City. He followed a long line of other organized crime figures whom the government had already convicted for their participation in this "Windows" scheme. See ,e.g., United States v. Amuso, 21 F.3d 1251, 1254 (2d Cir. 1994) (describing progression of Windows prosecutions).

The government presented its case against Gigante in large part through the testimony of six former members of the Mafia who had become cooperating witnesses: Alphonso D'Arco, once the acting boss of the Lucchese family; Salvatore Gravano, the former Gambino family underboss; Peter Chiodo, who was a Lucchese captain; Phillip Leonetti and Gino Milano, past members of La Cosa Nostra in Philadelphia; and Peter Savino, a former associate of the Genovese family. The government also introduced a wealth of tapes recorded over many years of surveillance of Gigante and other Mafia figures, and supported this evidence with the testimony of law enforcement officers.

The cooperating witnesses testified at length about the structure and rules of La Cosa Nostra, described Gigante's place in the Mafia hierarchy, and detailed his efforts to hide his complicity through continuous public demonstrations of mental instability. The tapes and

witnesses revealed Gigante's complicity in planning and approving murders within the Mafia and in assisting in the direction of the Windows extortion scheme.

The jury acquitted Gigante or failed to reach a verdict on all charges surrounding the murders of Jerry Pappa, Anthony Capongiro, Fred Salerno, John "Keys" Simone, Frank Sindone, Frank "Chickie" Narducci, Rocco "Rocky" Marinucci, and Enrico "Eddie" Carini. The jury found Gigante guilty of the more recent conspiracies to murder Peter Savino and John Gotti, although the court later dismissed the charge of conspiracy to murder Gotti as time-barred. See United States v. Gigante, 982 F. Supp. 140, 159 (E.D.N.Y. 1997). Gigante was also convicted on all the extortion and labor payoff counts related to the Windows scheme. See id. at 177-81 (reprinting completed jury verdict sheet). Gigante was sentenced to twelve years in prison, five years of supervised release, and a fine of $1,250,000. This appeal followed.

DISCUSSION

I. The Use of Two-Way Closed-Circuit Television Testimony

Gigante argues that the admission of Peter Savino's testimony via two-way, closed-circuit television testimony from a remote location violated his Sixth Amendment right

"to be confronted with the witnesses against him." U.S. Const. amend. VI. Gigante maintains that no compelling government interest justified the deprivation of his constitutional right to a face-to-face confrontation with Savino.

Preliminarily, we note the government's argument that Gigante waived his right to confront Savino. The government asserts that by refusing to attend a deposition of Savino pursuant to Rule 15, Fed. R. Crim. P., Gigante waived his right to a face-to-face confrontation. More fundamentally, the government argues that Gigante waived his confrontation rights through his own misconduct, with protracted attempts to delay his own trial by feigning incompetence. We need not resolve these questions relating to possible waiver, however, because Gigante's claim fails on the merits: under the circumstances of this case, the procedures by which Savino testified did not violate Gigante's confrontation rights.

Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante, providing direct testimony of his involvement in the Windows scheme. As a cooperator with the government since 1987, Savino was a participant in the Federal Witness Protection Program. At the time of Gigante's trial in 1997, Savino was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed

location.

The government made an application for an order allowing Savino to testify via closed-circuit television due to his illness and concomitant infirmity. Judge Weinstein held a hearing to determine whether Savino was able to travel to New York to testify at Gigante's trial. At this hearing, an emergency medicine physician employed by the Federal Witness Protection Program testified that he had examined Savino and that "it would be medically unsafe for [Savino] to travel to New York for testimony." Defense counsel cross-examined the government physician and then presented an oncologist of their own who testified that "it would not be life-threatening" for Savino to travel to New York.

Judge Weinstein held in a published opinion that "[m]edical reports and testimony for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." United States v. Gigante, 971 F. Supp. 755, 756 (E.D.N.Y. 1997). Although Gigante attacks this determination, we review this factual finding for clear error. Judge Weinstein's holding was supported by evidence in the record and was not clearly erroneous.

Because of Savino's illness, Judge Weinstein permitted him to testify via two-way, closed-circuit television, basing his decision upon his "inherent power" under Fed. R. Crim. P. 2 and 57(b) to structure a criminal

trial in a just manner. Gigante, 971 F. Supp. at 758-59. During his testimony, Savino was visible on video screens in the courtroom to the jury, defense counsel, Judge Weinstein and Gigante. Savino could see and hear defense counsel and other courtroom participants on a video screen at his remote location.

Gigante's argument that this procedure deprived him of his right to confront Savino amounts to the argument that his Sixth Amendment right could only be preserved by a face-to-face confrontation with Savino *in the same room*. We disagree. While the use of remote, closed-circuit television testimony must be carefully circumscribed, Judge Weinstein's order in this case adequately protected Gigante's confrontation rights.

The Supreme Court has declared that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). In Coy, the Court reversed the defendant's conviction for sexual assault after a 13-year-old alleged victim was permitted to testify out of sight of the defendant. See id. at 1022. However, the right to face-to-face confrontation is not absolute; in Maryland v. Craig, 497 U.S. 836 (1990), the Court held that one-way closed-circuit television testimony by a child witness in an abuse case may be permissible upon a case-specific finding of necessity. See id. at 857.

The Supreme Court explained that "[t]he central

concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845. The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence. See id. at 845-46.

The closed-circuit television procedure utilized for Savino's testimony preserved all of these characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself.[1] Gigante forfeited none

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[1]There is some dispute over whether Savino could see Gigante himself in the background of his monitor. However, it is clear that Judge Weinstein afforded defense counsel the opportunity to place Gigante's televised visage squarely before Savino (Mr. Culleton was to cross-examine Savino):

> THE COURT: Is this where you wish the camera--
> MR. CULLETON: Exactly. He can look at me and I'll be looking at him.
> THE COURT: You don't want him to look at the defendant?
> MR. CULLETON: Not necessary.
> THE COURT: And you don't want the defendant to look

of the constitutional protections of confrontation.

In Craig, the Supreme Court indicated that confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850. Gigante seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by Coy, it is not necessary to enforce the Craig standard in this case.

A more profitable comparison can be made to the Rule 15 deposition, which under the Federal Rules may be employed "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for

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directly eye to eye?

MR. CULLETON: We don't need it. Absolutely not, Judge.

Gigante, having explicitly declined the option of being viewed by Savino, has waived any claim of error based on that deprivation.

use at trial." Fed. R. Crim. P. 15(a). That testimony may then be used at trial "as substantive evidence if the witness is unavailable." Fed. R. Crim. P. 15(e). Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness "is unable to be present or to testify at the hearing because of . . . physical or mental illness or infirmity." Fed. R. Evid. 804(a)(4).

The decision to permit a deposition under Rule 15 "rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion." United States v. Johnpoll, 739 F.2d 702, 708 (2d Cir. 1984) (internal citations omitted). "It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial." Id. at 709. Under the circumstances of this case, Judge Weinstein could have admitted Savino's testimony pursuant to Rule 15 without offending the confrontation clause. See United States v. Salim, 855 F.2d 944, 954-55 (2d Cir. 1988); Johnpoll, 739 F.2d at 710.

Judge Weinstein considered the utility of a Rule 15 deposition for preserving Savino's testimony, and noted that the government was "able to make the threshold showing entitling it to a [Rule 15] deposition." Gigante, 971 F. Supp. at 758. Had Judge Weinstein allowed a deposition,

this would not have been an abuse of discretion, given the medical evidence of Savino's poor health. However, due to the joint exigencies of Savino's secret location and Gigante's *own* ill health and inability to travel, Judge Weinstein concluded that "deposing the witness is not appropriate," and that "contemporaneous testimony via closed circuit televising affords greater protection of [Gigante's] confrontation rights than would a deposition." Id. at 758-59.

We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.

Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. However, two-way closed-circuit television testimony does not necessarily violate the Sixth

Amendment. Because this procedure may provide at least as great protection of confrontation rights as Rule 15, we decline to adopt a stricter standard for its use than the standard articulated by Rule 15. Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice.

The facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfy this exceptional circumstances requirement, and Judge Weinstein did not abuse his discretion by allowing Savino to testify in this manner. Savino's testimony did not deprive Gigante of his right to confront his accuser under the Sixth Amendment.

II. The Admission of Coconspirator Testimony

Gigante contends that Judge Weinstein admitted substantial prejudicial testimony by misconstruing the proper scope of Fed. R. Evid. 801(d)(2)(E), which provides that "a statement is not hearsay if . . . [it] is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Gigante argues that these evidentiary rulings constituted reversible error.

To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of that conspiracy. See Orena, 32 F.3d at 711; United States v. Maldonado-Rivera, 922 F.2d 934, 958 (2d Cir. 1990) (citing Bourjaily v. United States, 483 U.S. 171, 175 (1987)). We will not disturb a district court's findings on these issues unless they are clearly erroneous. Moreover, any improper admission of coconspirator testimony is subject to harmless error analysis. See Orena, 32 F.3d at 711.

The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment. See id. at 713. In addition, while the hearsay statement itself may be considered in establishing the existence of the conspiracy, "there must be some independent corroborating evidence of the defendant's participation in the conspiracy." United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996); see also Fed. R. Evid. 801(d)(2). The identities of both the declarant and the witness who heard the hearsay evidence, however, are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy. See Tellier, 83 F.3d at 580 n.2; Fed. R. Evid. 801(d)(2) advisory committee's note to 1997

Amendment.

As to the second requirement, statements made during the course and in furtherance of a conspiracy "must be such as to prompt the listener . . . to respond in a way that promotes or facilitates the carrying out of a criminal activity." Maldonado-Rivera, 922 F.2d at 958. This can include those statements "that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." Id. at 959. In addition, while idle chatter among conspirators does not satisfy the "in furtherance" requirement of Rule 801(d)(2)(E), often these statements are admissible as declarations against penal interest or under the state of mind hearsay exception. See United States v. Paone, 782 F.2d 386, 390-91 (2d Cir. 1986).

A conspiracy may involve only two or three individuals. In the context of a RICO prosecution of organized criminals, however, the relevant conspiracy may grow quite large. For example, the Windows conspiracy, of which Gigante was a part, was a sprawling criminal enterprise involving both the Genovese and Colombo crime families and enveloping an entire industry. See United States v. Gigante, 39 F.3d 42, 44 (2d Cir. 1994) (describing Windows scheme). The conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d)(2)(E) must expand accordingly

to encompass the full extent of the conspiracy.

However, even in the context of organized crime, there is a limit to the proper use of Rule 801(d)(2)(E) to admit coconspirator testimony. The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia. And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under Rule 801(d)(2)(E). See Tellier, 83 F.3d at 581.

Early in Gigante's trial, Judge Weinstein announced his finding that "there is a general overriding conspiracy among all of these alleged Mafia groups." He then admitted some evidence under Rule 801(d)(2)(E) based solely on this finding of a general conspiracy. This was error. The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place -- organized crime membership alone does not suffice.

Although we find that Judge Weinstein construed

Rule 801(d)(2)(E) too broadly, many of the statements contested by Gigante were properly admitted. For example, Gigante contends that it was error to admit Alphonse D'Arco's testimony that Jimmy Ida (of the Genovese Family) told D'Arco that Gigante wanted him to help locate and murder Savino in Hawaii. Similarly, Gigante contests the district court's admission of D'Arco's testimony that Vittorio Amuso (his boss in the Lucchese family) told D'Arco that Gigante was aware of and approved of the plot to murder John Gotti. Gigante argues that there was no independent corroborating evidence of his involvement in a conspiracy to murder either Savino or Gotti. However, there was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies. The admission of these statements was not clearly erroneous.

On other occasions, the district court erred in admitting evidence under Rule 801(d)(2)(E). Gigante argues that Judge Weinstein improperly admitted a tape recording of Gotti, Gravano and John D'Amato (street boss of a New Jersey family) discussing a conspiracy to murder Corky Vastola, and stating that they needed to secure Gigante's permission to utilize a particular person to kill Vastola. The evidence indicated that Gigante refused this permission.

The discussions between Gotti, Gravano and D'Amato should have been excluded, because there was no evidence that Gigante ever joined in a conspiracy with those figures to murder Vastola. The government argues that these discussions reveal Gigante's role in a general process and network of criminal conspiracy and activity. However, these discussions were not "in furtherance of" a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant.

Nonetheless, to the extent that these or any other statements were erroneously admitted under Rule 801(d)(2)(E), they did not "effect actual prejudice resulting in 'substantial and injurious effect or influence in determining the jury's verdict.'" Ayala v. Leonardo, 20 F.3d 83, 92 (2d Cir. 1994) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Several admitted statements would have been properly admissible either as declarations against penal interest or under the state of mind exception to the hearsay rule. The jury acquitted Gigante on some of the charges against him, convicted him on other charges, and were unable to reach a verdict on still other allegations. This demonstrates that the jury was able to distinguish among the charges against Gigante and weigh the evidence on each separate count. There was substantial direct and circumstantial evidence connecting Gigante to each of the crimes for which he was convicted. Having

considered all of Gigante's evidentiary arguments, we hold that any errors by the district court were harmless.

III. Competency to Stand Trial

Gigante also challenges the trial court's determination that he was competent to stand trial. We uphold a district court's finding of competence unless that finding is clearly erroneous. See United States v. Morrison, 153 F.3d 34, 46 (2d Cir. 1998). Under this highly deferential standard, "'[w]here there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.'" United States v. Nichols, 56 F.3d 403, 411 (2d Cir. 1995) (quoting United States v. Villegas, 899 F.2d 1324, 1341 (2d Cir. 1990)).

Judge Weinstein was not the first judge to make a finding regarding Gigante's competency. Gigante's trial had been previously assigned to Judge Eugene Nickerson, who conducted the first hearings to determine whether Gigante was competent to stand trial. Four separate psychiatrists testified that Gigante was incompetent, although reservations were expressed that he might be malingering. See United States v. Gigante, 925 F. Supp. 967, 968 (E.D.N.Y. 1996).

Judge Nickerson then received testimony from former members of the Mafia (many of whom later testified at Gigante's trial), and made the factual findings that

"Gigante was a forceful and active leader of the Genovese family from at least 1970 on" and that Gigante had put on a "crazy act" for many years in order "to avoid apprehension by law enforcement." Id. at 976. After being presented with these findings, two of the examining psychiatrists changed their opinion, indicating that they now thought Gigante was malingering; one said Gigante was competent to stand trial, and the other said it was quite possible that Gigante was competent. The remaining psychiatrists held to their earlier findings of incompetence. See United States v. Gigante, 987 F. Supp. 143, 146 (E.D.N.Y. 1996). Judge Nickerson found "the weight of medical opinion to show that Gigante is mentally competent to stand trial." Id. at 147.

When Gigante renewed his claim of incompetence due to Alzheimer's disease, Judge Nickerson recused himself, and the case was reassigned to Judge Weinstein. See Gigante, 982 F. Supp. at 146. Gigante presented new evidence of incompetence in the form of a Positron Emission Tomography (PET) scan of Gigante's brain and the results of a battery of tests designed to identify malingering. The defense experts who presented this evidence testified that Gigante was incompetent to be tried. The government then presented a witness who testified that it was possible that the results of these tests were due to the drugs Gigante was receiving. See id. at 147. Judge Weinstein held that Gigante was competent and ordered that

the trial proceed. See id. at 148.

Judge Nickerson and Judge Weinstein, after conducting separate hearings, reached the identical conclusion that Gigante was malingering, and that he was competent to stand trial. This was a permissible conclusion in light of the expert testimony and extensive evidence of Gigante's attempts to elude prosecution, and we do not find it to be clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the /s/ eleventh day of March one thousand nine hundred and nienty-nine.

USA

v Dkt No : 98-1001

Gigante

A pettion for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Vincent Gigante.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

File Stamped by the United States Court of Appeals Second Circuit, Clerk's Office on March 11, 1999

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT
OF NEW YORK

UNITED STATES of America

v.

Vincent GIGANTE, Defendant.

No. CR 93-368(JBW).

United States District Court, E.D. New York.

July 21, 1997.

MEMORANDUM AND ORDER

WEINSTEIN, Senior District Judge.

This case raises an issue of apparent first impression in the federal courts. A chief witness in this RICO case is too ill to testify in court. He is in the Federal Witness Protection Program, at some distance from this state so that the jury cannot be convened in his presence. It might jeopardize the safety of the witness were the defendant's full counsel staff to be present at the witness' deposition since that would reveal the witness' location and put him in serious danger from criminals against whom he has testified and provided information. Given defendant's claimed serious physical disabilities, it is conceded that he will not attend any deposition at a place convenient to the witness.

A full hearing was conducted to determine whether it is practicable for the witness to appear in person at trial. Medical reports and testimony for the government and defendant fully supported the government's contention, by

clear and convincing proof, that the witness could not appear in court.

The government seeks to have the witness' testimony taken through closed circuit television. The defendant contends that this would violate his constitutional right to confrontation. The closed circuit system permits the witness to view and hear counsel and defendant, while simultaneously allowing counsel, defendant, judge and jury to view and to hear the witness. The defendant's objection is overruled.

The optimal way of conducting a trial under American practice is for the witness in person in court to face the defendant and the trier, and to be subject to immediate cross-examination in their presence. See e.g., Maryland v. Craig, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990) (historic preference for in-person encounters between accused persons and their accusers). American criminal procedure, however, is pragmatic. It recognizes that this ideal condition can not be made available in every instance if there is to be an effective search for truth in an atmosphere protecting the defendant's needs for fairness and due process and the public's right to protection against crime. See, e.g., Craig, 497 U.S. 836, 850, 110 S.Ct. 3157, 3166, 111 L.Ed.2d 666 (1990) (sanctioning the use of closed circuit television to transmit testimony of a witness when "necessary to further an important public policy" and where "the reliability of the

testimony is otherwise assured").

Modification of the face-to-face in-person confrontation rule is exemplified by the extensive hearsay exceptions permitting the trier to rely upon the statements made outside of court. See, e.g., Fed.R.Evid. 803, 804; White v. Illinois, 502 U.S. 346, 356 n. 8, 112 S.Ct. 736, 742, 116 L. Ed. 2d 848 (1992) (exceptions to hearsay rule recognized in Federal Rules of Evidence bear sufficient reliability to satisfy requirements of Confrontation Clause); Lee v. Illinois, 476 U.S. 530, 543, 106 S.Ct. 2056, 2063, 90 L.Ed.2d 514 (1986) (even when hearsay does not fall within a hearsay exception, "it may nonetheless meet Confrontation Clause reliability standards"); United States v. Sasso, 59 F.3d 341, 348-49 (2d Cir.1995) (incriminating hearsay statements against a defendant); United States v. Matthews, 20 F.3d 538, 544-545 (2d Cir.1994) (when a declarant is unavailable and his prior out-of-court statements are sufficiently reliable, admission at trial of his hearsay declarations is constitutionally permissible). Depositions of out-of-court witnesses are permitted in criminal cases. See Fed.R.Crim.P.15 (depositions when due to exceptional circumstances are in the interest of justice); United States v. Donaldson, 978 F.2d 381, 392-93 (7th Cir. 1992) (permitting the government to present deposition testimony of witness who recently gave birth and had other medical complications causing her to be hospitalized the day before she was to testify at trial). Such depositions are allowed

even where they are taken pursuant to continental practice where the examination is conducted by the magistrate rather than by the attorneys. See United States v. Salim, 664 F. Supp. 682 (E. D. N. Y. 1987), aff'd, 855 F.2d 944 (2d Cir. 1988).

Recognizing this history, the Supreme Court, effective December 1, 1996, amended Rule 43 of the Federal Rules of Civil Procedure to provide explicitly for televised presentation of testimony as follows (strike-outs indicate prior language eliminated and underlining material added):

> In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

In the advisory committee notes to these amendments to Federal Rule of Civil Procedure 43, the appropriateness in special circumstances of testimony being transmitted from a location other than the courtroom was recognized:

> Contemporaneous transmission of testimony from a different location is permitted only on

showing of good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be able to be available at a later time....

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony.

> Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces that equivalent of a written statement ordinarily should not be used.
>
> Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.
>
> Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, and perhaps by video record, as a means of supplementing transmitted testimony.

The analogous Federal Rule of Criminal Procedure was not amended in the same way. Compare Fed.R.Crim.P. 26 and Fed.R.Civ.P. 43. That circumstance does not preclude the use of contemporaneous televised

examinations of witnesses in federal criminal cases. Prior to the 1996 amendment to civil Rule 43, a court's need to seek the truth, to efficiently conduct a trial, and to ensure that persons with important information relating to the case be heard, permitted a court to interpret the Federal Criminal Rules in ways that justice mandates. See generally, Fed.R.Crim.P. 2. Under its inherent power it could have ordered the form of testimony by television required in the instant case. Cf., United States v. Hasting, 461 U.S. 499, 505-06, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983) ("federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or Congress"). Since the Rules of Criminal Procedure do not speak specifically to this matter, a court conducting a criminal case is permitted to draw from and mirror a practice that is sanctioned by the Federal Rules of Civil Procedure. Fed.R.Crim.P. 57 ("a judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district" where there is no controlling law on an issue).

Amended civil Rule 43 expresses power that existed under prior law. It cannot be construed as a limitation on the previous inherent power of the courts in criminal cases that continues under the Federal Rules of Criminal Procedure. Rule 2 of the Federal Rules of Criminal Procedure requires district courts to construct the Rules to provide "fairness in administration and the elimination of

unjustifiable expense and delay" in criminal proceedings. Television procedures for providing testimony in exceptional cases is essential if the policy expressed in criminal Rule 2 is to vindicated. Cf., Harrell v. State, 689 So.2d 400 (Fla. Dist. Ct. App. 1997) " satellite testimony enhances the efficiency of our legal system" in case where Argentinian residents testified as witnesses in a Florida criminal trial).

Prior to amendment of the civil Rule federal trial courts have repeatedly, in civil cases, taken testimony by telephone and closed circuit television. The jury has never had any difficulty in evaluating such testimony. The court of appeals for the Second Circuit permits oral argument by television with counsel and the court separated geographically. There is increasing use in courts across the country of appearances by closed circuit television at arraignments to avoid the necessity of police and those arrested traveling to be before a magistrate. See, e.g., id. at 404 (audiovisual technologies are currently utilized in Florida during presentments and arraignments in criminal cases).

In this case the government has been able to make the threshold showing entitling it to a deposition. See Donaldson, 978 F.2d 381, 392-93 (7th Cir.1992). Nevertheless, deposing the witness is not appropriate. First, the deposition rule requires the requesting party to notify all parties of its intention to depose the witness, to provide

them with the name and address of the witness, and disclose the location of the deposition site. Fed.R.Crim.P. 15(b). Disseminating the address of the witness in this case or his whereabouts would be dangerous. Second, a defendant generally has the right to be present with his attorneys at a deposition. Fed.R.Crim.P. 15(b). Defendant concedes that his own purported poor health precludes his traveling to the deposition and he prefers televised presentation of live testimony to a deposition. Receiving contemporaneous testimony via closed circuit televising affords greater protection of his confrontation rights than would a deposition.

It is desirable that the defendant be permitted, if he wishes, to face the witness directly so that each sees the other and the jury sees both while the testimony is being given. The televising arrangements made by the government provide this full confrontation since the witness sees and hears the defendant while the defendant sees and hears the witness. The jury, court, and counsel simultaneously see both. In short, the arrangements proposed by the government in this case satisfy fully the requirements of the Constitution and the Federal Rules of Criminal Procedure.

The process will be memorialized by a sealed video tape recording for purposes of any appeal. The video tape may not be released to the media. See Fed.R.Crim.P.53 (broadcasting from courtroom in criminal trial not

permitted); cf., Hamilton v. Accu-Tek, 942 F.Supp. 136 (E.D.N.Y.1996) (broadcasting in civil case permitted). Any reading back of testimony requested by the jury during its deliberations will be from the court reporter's transcript; use of the video tape recording for this purpose might result in evaluating this testimony differently from other testimony taken in open court.

Nicholas Turner is appointed Special Master to accompany one attorney representative of the defendant and one of the government to the place where the witness will appear. None of them will reveal this place to anyone. The government will furnish transportation. Other terms of the accompanying order follow the court's oral instructions.